FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,
Appellants,

vs.

NORCHEK OF NEWPORT, INC., d/b/a
WOODY'S WHARF; ROBERT KINNEY,
Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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SUMMARY OF ARGUMENT

The 1978 Amendments make the following distinctions:

(1) A drunken 20-year old can stumble into traffic and sue the bar that served him yet a child maimed by a drunken 21-year old cannot sue even if the bar committed a criminal act.

(2) A social host who serves alcohol to a guest with a mental inability to handle alcohol may be held liable whereas a bar that serves a patron with an identical mental disability, due to the patron's obvious intoxication, is immune.

(3) A jury may determine proximate causation where a party gives car keys to an obviously intoxicated driver but not where a bartender gives alcohol to an obviously intoxicated driver.

Appellees argue that these distinctions are rational and that, even if they appear unreasonable, they represent a legislative choice not subject to judicial second-guessing. Since Marbury v. Madison, 5 U.S. 137 (1803), however, this Court has had the power and responsibility to measure legislation against the U.S. Constitution. The 1978 Amendments, as applied in this case, deny equal protection and due process because they protect criminals, not victims of crimes, and they deny Appellants the opportunity to be heard on the issue of "proximate causation."

Appellees believe that a state may constitutionally immunize criminals from the civil consequences of their misconduct and that a state may

protect "obviously intoxicated" minors while increasing the risk of injury to innocent minors. Appellees ask this Court to blindly bless these positions. Alcohol-related injuries are a problem of nationwide significance. This case is before the Court on appeal; any decision will have precedential value. Appellees' position should be rejected. At a minimum, this Court should take a hard look at this case before accepting Appellees' position.

THE 1978 AMENDMENTS SHOULD BE REVIEWED UNDER A STRICT OR INTERMEDIATE SCRUTINY STANDARD BECAUSE THEY AFFECT FUNDAMENTAL, OR, AT LEAST, IMPORTANT RIGHTS

Appellees do not deny that public safety is a fundamental interest. Appellees assert, however, that the "1978 amendments do not affect or infringe any person's right to life."

[Motion to Dismiss or Affirm ("Mo. to Dis."), p.7, n.3.] This position ignores extensive documentation showing that drunk driving is a deadly problem in this country and that commercial providers of alcohol are a significant part of the problem. The 1978 Amendments severely and adversely affect public safety.

Even when viewed narrowly, the 1978 Amendments eliminate a common law cause of action which is a protectable property right. This Court has recently held "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." [Logan v. Zimmerman Brush Company, 455 U.S. 422, 428 (1982); see also Martinez v. State of Cal., 444 U.S. 277, 281-282 (1980).]

Appellants assert under Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) that a cause of action is not a recognizable fundamental interest. The Price-Anderson Act, under review in Duke Power Co., provided for an aggregate liability limit in the event of a nuclear incident; it did not eliminate any cause of action. The Court in Duke Power held that this type of legislation was purely economic regulation.[1] The 1978 Amendments eliminate a class of suits; they are not merely economic in nature. Duke Power Co. does not apply.

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[1] City of New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976), also cited by Appellees is distinguishable because the challenged legislation there was solely "economic regulation." [Id.]

Whether the 1978 Amendments are viewed broadly or narrowly, they affect a fundamental interest. As such, defendants must show that the 1978 Amendments have been "precisely tailored to serve a compelling governmental interest." [Plyler v. Doe, 457 U.S. 202, 217 (1982).]

Alternatively, this Court has used a heightened level of scrutiny where challenged legislation infringes a right which may not be fundamental but is nonetheless considered to be important. [Plyler v. Doe, supra; City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-442 (1985).] If not fundamental, public safety is at least important enough to justify intermediate scrutiny.

Where intermediate review is appropriate, as here, the objective served by a challenged classification must be "important" even if not "compelling." [See Reed v. Reed, 404 U.S. 71, 76-77 (1971).] Intermediate review also requires that the mechanisms used by the government "must be substantially related to achievement of [the] objectives" of the legislation. [Craig v. Boren, 429 U.S. 190, 197 (1976).]

Even under a rational basis test, the appellees must show that the legislation is reasonably designed to achieve a "legitimate state purpose." [Hooper v. Bernalillo County Assessor, 472 U.S. 612, 616 (1985).]

There is no compelling, important or even rational reason to promote the

economic interests of the liquor lobby over the general safety of the public. Immunizing criminals from the consequences of their misconduct is not reasonably designed to achieve this questionable objective. Nor is it even rational to attempt to "protect" obviously intoxicated minors, but not sober minors who are killed or injured by a drunk driver. The 1978 Amendments fail all three tests.

A STATE CANNOT CONSTITUTIONALLY GRANT CIVIL IMMUNITY FOR CRIMINAL MISCONDUCT

Appellees assert that numerous cases have affirmed the constitutionality of statutory tort immunities. [Mo. to Dis. at 9.] In none of the cases, however, does a court hold that immunizing a criminal from the civil consequences of his misconduct is a

legitimate exercise of legislative power. More importantly, in all of the cases cited by appellees, the immunized conduct had some positive value to society. In this case, however, the legislature has already proscribed Appellees' conduct because it hurts society.

Appellees' reliance on Duke Power Co. is misplaced. In Duke Power Co., the challenged legislation did not eliminate any cause of action but merely capped the total amount of economic exposure to be paid by the nuclear power industry, giving Congress the power to act in the event that the industry limit was insufficient. Victims were not left without a remedy.

Nor do the other cases cited by plaintiff hold that the state may grant

immunities to criminals. [In Vanderwater v. Hatch, 835 F.2d 239 (10th Cir. 1987), the challenged statute merely changed plaintiff's burden of proof from strict liability to negligence; in International Administrators v. Life Insurance Company, 753 F.2d 1373 (7th Cir. 1985), the court upheld legislation which was labelled an immunity but was in effect a privilege designed to promote the free flow of information to insurance companies; in Simpson v. United States, 652 F.2d 831 (9th Cir. 1981), the challenged statute was not an immunity but a declaration that land owners owed no duty of care to certain people using that property; in Corey v. Jones, 650 F.2d 803 (5th Cir. 1981), the Fifth Circuit without analysis

upheld the Georgia guest statute because this Court had not yet announced any guidelines with respect to the legitimacy of guest statutes, which do not immunize criminals.[2]

A victim should have a right to sue the criminal that caused his injury. [Calif. Civ. Code §§3520 and 3523, Jur. Stmt., p. 25.] There is a strong policy interest in assuring adequate compensation for innocent victims. The unsupported proposition that the state may immunize criminals is not rational and must be rejected.

Appellees' purported legislative objectives for the 1978 Amendments do

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[2] Appellees also cite Cory v. Shierloh, 29 Cal.3d 430 (1981) as authority that tort immunities are constitutional. Appellants have already demonstrated that Cory is distinguishable and not controlling. [Jur. Stmt., p. 14.]

not save them. The first proposed "rational basis" is that the 1978 Amendments encourage adults to take responsibility for any injury caused by their negligence or willful acts. [Mo. to Dis., p. 10.] The 1978 Amendments actually achieve the opposite result. Where a bartender serves an obviously intoxicated patron, he has engaged in criminal conduct yet the legislation frees him from any civil responsibility for subsequent injuries.

Second, appellees argue under Duke Power Co. that California may promote the liquor supply industry by lowering its collective cost of insurance. Duke Power Co., is inapposite. It concerned the nuclear power industry, which is subject to extensive and strict administrative controls. There is no

history of any physical injury as a result of a nuclear accident. Moreover, the Act there did not eliminate any cause of action and was designed to promote development of alternative sources of energy.

Widely available liquor does not have the same social utility as widely available energy. The physical injury wrought by drinking drivers is not hypothetical, but a proven fact. Thus, the comparison to Duke Power Co. fails.

Even if a strong liquor supply industry is considered more important than public safety, there is no evidence that the 1978 Amendments are rationally designed to achieve this goal. The evidence of economic injury set forth in Appellees' Appendix is anecdotal at best, not scientific. At

least 35 other states allow injured parties to sue a bar that serves an obviously intoxicated patron. [Sipes, "The Emergence Of Civil Liability For Dispensing Alcohol: A Comparative Study," 8 The Review of Litigation, 1, 31-51 (1988).] The liquor industry has survived in these jurisdictions. The notion that immunities for criminals are necessary for the continued existence of California's liquor supply industry is nonsense.

Third, appellants argue under Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935), that the state is not required to use every means available to attack a problem. In Semler, this Court held that the state may regulate one profession without regulating all professions.

A state cannot outlaw conduct in one part of a statute however, and promote the same conduct in a later part. Once a state decides to attack an evil, it must do so rationally. It defies logic to use expensive enforcement mechanisms such as administrative and criminal liability and forbid civil remedies which provide stronger, more effective enforcement.

Appellees cite cases from Florida, Michigan, Illinois and Missouri for the proposition that limitations on dram shop liability are constitutional. In three of those four states, however, the courts did not decide whether a state may immunize a criminal from the civil consequences of his acts.[3]

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[3] Michigan, Illinois and Missouri all allow an injured party to sue a bar that serves an obviously intoxicated patron.

Indeed, although all states make it a crime to serve an obviously intoxicated person, only five states, Florida, California, Louisiana, South Dakota, and Wisconsin, have statutorily removed such criminals from the class of dram shop defendants. [Sipes, supra.] This Court's decision in this case will be stare decisis in those five states.

More significantly, this case will decide a more far reaching issue: whether a state, under any circumstances, may immunize a criminal and deny a civil remedy to his victim.

A CAUSE OF ACTION IS A DUE PROCESS PROPERTY INTEREST

Appellees rely on Duke Power Co. for the proposition that legislation which limits or abolishes a cause of action cannot violate the due process clause.

Duke Power Co., however, is distinguishable because it involved purely economic legislation whereas the 1978 Amendments threaten public safety, a due process interest. Moreover, under Logan and Martinez, a tort claim is a species of property protected by the due process clause.

THE 1978 AMENDMENTS TREAT PROXIMATE CAUSATION AS AN ISSUE OF FACT NOT LAW

Appellees suggest that the irrebuttable presumption doctrine is narrow or disfavored.[4] This Court noted, however, in Elkins v. Moreno, 435 U.S. 647, 648 (1978) that the doctrine is still viable.

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[4] Even if the irrebuttable presumption issues are analyzed as a species of equal protection, appellants have demonstrated that the 1978 Amendments as applied in this case do not pass constitutional muster.

The doctrine applies in this case because the state purports to be concerned with the existence of "proximate causation," yet at the same time denies any opportunity for Appellants to introduce evidence bearing on the determination of that fact.

Appellees assert that the phrase "proximate causation" as used in the 1978 Amendments refers to a legal conclusion, not a factual determination. Appellants' only authority, Valdez v. J.D. Diffenbaugh Co., 51 Cal.App.3d 494 (1975), is inapt because the court there confused the concepts of duty and proximate causation. [Jur. Stmt. pp. 36-37.]

Proximate causation has always been regarded as a question of fact for the

jury. [See Gomez v. Ticor, 145 Cal.App.3d 622, 627 (1983).] Specifically, in the context of liability for service of alcohol, the California Supreme Court, in Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 399 (1978), has held that causality is an issue of fact to be resolved by a jury. [The legislature had an opportunity to overrule Ewing when enacting the 1978 Amendments and did not do so.]

The best evidence that the 1978 Amendments treat "proximate causation" as a fact issue comes from the legislation itself. Bus. & Prof. Code §25602.1 states that any plaintiff pursuing recovery under the narrow exception to the immunity must prove that the "furnishing of alcoholic beverage" is the proximate cause of the

personal injury or death sustained by such person, thus making proximate causation a factual issue.

CONCLUSION

For the foregoing reasons Appellants respectfully request that this Court should note probable jurisdiction of this appeal, or, in the alternative, reverse the decision of the California Court of Appeal.

Respectfully submitted,

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